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GUN CONTROL

Improving the National  
Instant Criminal  
Background Check  
System

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# Gun Control: Improving the National Instant Criminal Background Check System

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Mr. Chairman and Members of the Committee:

I am pleased to be here today to discuss selected topics from our two recently completed reviews<sup>1</sup> pertaining to the establishment and operation of the National Instant Criminal Background Check System (NICS). NICS was established in November 1998 as mandated by the Brady Handgun Violence Prevention Act.<sup>2</sup>

My testimony today will focus on four aspects of NICS: (1) system availability and responsiveness; (2) type of information available under NICS compared to that available to state and local law enforcement agencies prior to NICS; (3) advantages and disadvantages of NICS background checks being conducted by designated state agencies rather than the FBI; and (4) the extent to which transactions under NICS have resulted in firearms being sold to persons ineligible to possess a firearm.

In our February and April 2000 reports, we noted the following:

- NICS set a goal of being available 98 percent of its scheduled operating time. It met this goal 4 of the months and did not meet it 8 of the months between November 30, 1998, and November 30, 1999. During this time period, about 72 percent of callers received a proceed response within minutes; the other 28 percent were initially delayed. For about 80 percent of the delayed transactions, FBI examiners took 2 hours or less from the time they received the transaction information to provide a proceed or deny response.
- Establishment of the newly created NICS Index database provides centralized access to data that were not available to state and local agencies prior to NICS. However, the NICS Index does not contain all potentially disqualifying records.
- State agencies are generally better positioned to perform NICS background checks than the FBI because they may have access to additional data and be better able to interpret their own state records and laws. However, certain barriers have prevented most states from becoming full participants in NICS.
- During the first 10 months of NICS implementation, 2,519 persons who were sold guns were later determined by the FBI to be prohibited from owning them. These transactions resulted from NICS background checks

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<sup>1</sup> Gun Control: Implementation of the National Instant Criminal Background Check System (GAO/GGD/AIMD-00-64, Feb. 29, 2000); and Gun Control: Options for Improving the National Instant Criminal Background Check System (GAO/GGD-00-56, Apr. 12, 2000).

<sup>2</sup> The Brady Act, Public Law 103-159 (1993).

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that were not completed by the FBI within 3 business days and, according to the provisions of the Brady Act, the sales were then allowed to proceed by default.

Recognizing the potential public safety risks associated with prohibited persons being allowed to purchase firearms, we identified three options to improve NICS by minimizing the number of transactions involving prohibited persons that are allowed to proceed by default.

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## Background

Effective February 28, 1994, the interim provisions of the Brady Act required licensed firearms dealers to request a presale background check on handgun purchasers. These checks generally were to be conducted by the chief law enforcement officer (CLEO)<sup>3</sup> in the purchaser's residence community to determine, on the basis of available records, if the individual was legally prohibited from buying the firearm under the provisions of federal, state, or local law. The sale was not to be completed for 5 business days unless the dealer received an approval from the CLEO before that time. If the CLEO did not contact the dealer by the end of the 5-day period, the dealer could make the sale unless the dealer had reason to believe the transaction would be unlawful.

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## NICS Implementation

Beginning on November 30, 1998, the permanent provisions of the Brady Act became effective with implementation of NICS. Managed by the Federal Bureau of Investigation (FBI), NICS is used to make presale background checks for purchases from licensed firearms dealers of all firearms, not just handguns.<sup>4</sup>

Unlike the decentralized background check process under interim Brady, NICS allows the FBI and states to check a person's eligibility to purchase firearms using a single, computerized search. The NICS background check provides centralized access to criminal history and other potentially disqualifying records by querying three national databases:

- National Crime Information Center 2000 (NCIC 2000). Predating NICS, NCIC 2000 is the nation's most extensive computerized criminal justice information system. Among other things, NCIC 2000 contains records on wanted persons and persons under protection or restraining orders.

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<sup>3</sup> Brady defined a CLEO as the "chief of police, sheriff, or an equivalent officer or the designee of any such individual." In some states—by agreement among the applicable law enforcement agencies—the state police department served as the CLEO.

<sup>4</sup> NICS background checks are to be performed in connection with firearms transfers and are not to be limited to firearms sales (see 63 FR 58306). When we use the terms "buyer" or "purchaser," we are also referring to other firearms recipients, such as individuals redeeming pawned firearms.

- Interstate Identification Index (III). Also pre-dating NICS, III is an index-pointer system for the interstate exchange of criminal history records. Among other things, III records include information on persons arrested or convicted of felony and/or misdemeanor criminal offenses.
- NICS Index. A new database created specifically for NICS, the NICS Index contains information provided by federal and state agencies specifically identifying persons prohibited under federal law from receiving or possessing a firearm. The NICS Index includes records on unlawful drug users or addicts, illegal or unlawful aliens, persons who were dishonorably discharged from the military, persons who have renounced their U.S. citizenship, and persons who have been adjudicated or committed as a mental defective.

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### State Participation in NICS

To initiate background checks on persons attempting to purchase firearms, licensed firearms dealers contact either the FBI or designated state agencies (in those states willing to participate as NICS liaisons). Generally, depending upon the state in which the firearms dealer is conducting business and the type of firearm purchased, there are three methods of performing background checks:

- In the 24 so-called "nonparticipant" states, dealers are to contact the FBI for NICS background checks on all firearms transfers (permits or purchases). This category also includes the District of Columbia, Puerto Rico, and the U.S. Virgin Islands.
- In the 15 "full-participant" states, dealers are to contact a designated state or local agency—for example, the state police—which then conducts the NICS background check.
- In the remaining 11 "partial-participant" states, dealers are to contact (1) the FBI for background checks on long gun purchases or permits or (2) a designated state agency for background checks on handgun purchases or permits.

In designing NICS, the FBI hoped that as many states as possible would be full participants. Although the number of full-participant states is 15, the group includes some of the most populous states, such as California, Florida, Illinois, New Jersey, Pennsylvania, and Virginia. According to FBI data for the first year of NICS operations (Nov. 30, 1998, through Nov. 30, 1999), about one-half of all NICS background checks were conducted by state agencies.

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### 3 Days Allowed to Approve or Deny NICS Transactions

Under NICS, firearms are not to be transferred until a background check determines that the transfer will not violate applicable federal and state laws. However, the Brady Act allows law enforcement agencies up to 3

business days to complete the background check. If the background check cannot be completed within 3 business days (e.g., if available records in the national databases are incomplete and the buyer's eligibility is not verified within 3 days), the purchase is then allowed to proceed—that is, to proceed by default.

During the first year of NICS operations, the FBI and designated state agencies conducted about 8.8 million background checks using NICS. FBI data indicated that 2 percent (about 81,000) of the FBI's 4.4 million background checks resulted in denials. That is, the potential buyer was found to be disqualified under federal or state law from purchasing or possessing a firearm because, for example, criminal history records showed a felony conviction.

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## NICS System Availability and Responsiveness

The NICS system is scheduled to be open for business 17 hours a day, 7 days a week. The FBI has specified a NICS availability requirement of 98 percent. That is, the FBI expects NICS to operate satisfactorily 98 percent of the scheduled operating time. During the 12-month period from November 30, 1998, to November 30, 1999, NICS met or exceeded its availability requirement of 98 percent during 4 months. During the other 8 months, availability ranged from 92 percent to 97.7 percent, for an average of 95.4 percent. July 1999 marked the lowest point in availability during this time period, which was immediately preceded by the 4 months in which the availability requirement was met. During this 12-month period, no clear pattern of availability emerged.

FBI data show that for about 72 percent of the background checks conducted by the FBI as of November 30, 1999, NICS provided approval responses within 30 seconds after the purchaser's identifying information was input into the system. An FBI analysis of a sample of the 28 percent that were delayed responses concluded that most of these responses (80 percent) were resolved within 2 hours or less, and that the remainder (20 percent) took several hours or days to resolve. After 3 business days without a resolution, the transaction is considered to be a default proceed, and the gun dealer can then legally transfer the firearm without an affirmative response from the FBI as to the purchaser's eligibility. We discuss default proceed transactions in more detail later in this testimony.

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## NICS Index Provides Centralized Access to More Data but Has Not Reached Its Full Potential

Prior to NICS, state and local CLEOs had centralized, automated access to federal and state criminal history records and wanted-persons files—the basis for most firearms purchase denials—through NCIC and III. In addition, many CLEOs also had access to state or locally maintained data on some of the other firearm disqualifying factors—e.g., mental illness, court restraining orders, and domestic violence misdemeanors—either through statewide databases or local databases (such as city or county criminal justice systems). However, CLEOs did not access specific data files or databases for other nonfelony, noncriminal firearm disqualifiers—such as illegal or unlawful aliens, dishonorable discharges, and citizenship renunciations.

With the implementation of NICS, all of the firearm disqualifying categories can now be checked in a single, computerized search—to the extent automated records are available. That is, NICS continues to provide centralized access to criminal history and other records (such as domestic violence misdemeanors and restraining orders) through NCIC 2000 and III. In addition, NICS also provides simultaneous access to additional nonfelony, noncriminal disqualifying records—records that were not centrally available to CLEOs under interim Brady—through the newly established NICS Index.

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## NICS Index Does Not Include All Disqualifying Records

Despite improving access to firearm disqualifying records with the establishment of the NICS Index, NICS has not yet reached its full potential for performing firearms background checks. For example, 1 year after the implementation of NICS, the NICS Index database had relatively few records for most of the categories. As of November 30, 1999, the total number of records in the NICS Index was just over 1 million. However, the vast majority of those records (about 90 percent) covered just one category (illegal or unlawful aliens) and were provided by one federal agency, the Immigration and Naturalization Service (INS). In addition, the total represents only about a 10-percent increase over the number of records the NICS Index contained when it became operational 1 year earlier. And, nearly all of the increase involved records from just two federal agencies—INS and the Department of Veterans Affairs. Very few disqualifying records were obtained from the states during this time.

Because of certain barriers, we recognize that not all existing records can or will be included in the NICS Index, even though these records could be useful in identifying persons attempting to purchase firearms who are disqualified by law from doing so. For example, according to FBI officials, some state and local agencies may be prohibited by state law from sharing substance abuse or mental health records with other agencies or providing

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them to the NICS Index. Some states have also expressed concern about whether the records would ever be used for other purposes, such as background checks for employment or professional licensing.

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### FBI Continuing Its Efforts to Populate the NICS Index Database

According to FBI officials, the identification of records that should be included in the NICS Index requires ongoing cooperation among numerous federal and state agencies. The officials told us that the FBI's role in this process is one of outreach—that is, to ensure that all federal and state agencies have been notified of (1) the availability of the NICS Index and the system interface requirements and (2) the necessity to provide accurate and valid records that can be supported in the event of an appeal. As of December 1999, FBI officials summarized their ongoing outreach efforts as follows:

- The FBI was continuing to contact federal agencies to identify and obtain any relevant federal records that could be incorporated into the NICS Index. Approximately half of the agencies had responded; the remaining agencies were being contacted by telephone.
- For state records, the FBI had drafted a letter to be sent to all states inquiring whether they possessed any records to submit to the NICS Index. This letter was still being reviewed internally.
- The FBI was also contacting the NICS points-of-contact in each state that participates in NICS to further inquire about records that might be available for submission to the NICS Index.
- Also, the FBI was preparing an FBI/state memorandum of understanding to address the issue of how state records would be used in the NICS Index and allow states to delete their records if NICS' purpose were ever expanded beyond firearms background checks.

According to FBI officials, once initial outreach efforts were completed, the FBI would decide the types of additional action that were needed to increase the number of federal and state records in the NICS Index. However, the officials noted that, since the FBI cannot compel federal and state agencies to identify records and submit them to the NICS Index, the FBI's outreach efforts must be viewed as a continuous and cooperative process.

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## Increased State Participation Could Improve NICS, but Barriers Exist

Under permanent Brady, states generally are better positioned than the FBI to conduct NICS background checks. States have access to all of the information available to the FBI through NICS, plus some state agencies can access additional information available only to their respective state. Further, state agencies may be better able to interpret their respective state's criminal records and applicable firearms laws.

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## States May Have Access to More Disqualifying Records

In some cases, state agencies participating in NICS have access to more databases and/or records than the FBI. Under NICS, when the FBI or a state agency performs a firearm purchase background check, disqualifying records are automatically checked using NCIC 2000, III, and the NICS Index. The FBI's initial automated NICS check is limited to records in these three databases.<sup>5</sup> However, some states have automated access to additional databases or records available within their state, which cannot be accessed by or shared with other states or the FBI. As a result, this additional access to records may improve the states' ability to identify persons ineligible to purchase firearms. The following examples illustrate situations where state agencies conducting NICS background checks could access more firearm disqualifying data than the FBI:

- **Mental Disability.** Virginia, a full-participant state under NICS, has a state database that identifies individuals within the state who have mental health disabilities or have been adjudicated mentally incompetent. This state database is available only to the Virginia State Police for firearms background check purposes, and the database cannot be accessed by other states or the FBI either directly or through the NICS Index. According to Virginia State Police data for January through September 1999, Virginia's instant check system denied 51 firearms transactions based on information in the state's mental health database. If the FBI had been conducting Virginia's firearms background checks during this time, that information would not have been accessible to them.
- **Fugitives.** The wanted-persons file in NCIC 2000—which is queried during a NICS background check—may not contain records on every state arrest warrant issued. According to FBI officials, each individual agency that issues warrants is responsible for entering its warrants into NCIC 2000. Consequently, there is no way to tell how many outstanding warrants have been issued by state and local agencies but not entered into NCIC 2000. However, state officials have told us they are able to access their own state's outstanding warrants through state or local databases, regardless of whether the warrant had been entered into NCIC 2000.

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<sup>5</sup> For delayed transactions that require research beyond the initial automated inquiry, the FBI also accesses additional in-house automated databases.



- **Restraining Orders.** The restraining/protective order file in NCIC 2000—also queried during a NICS background check—may not contain records on every active state restraining order. According to FBI officials, the situation is similar to fugitive warrants in that each individual agency is responsible for entering restraining orders into NCIC 2000. Consequently, there is no way to tell how many orders have been issued by state and local agencies but not entered into NCIC 2000. Further, incompatibilities between state records and NCIC 2000 records requirements may prevent some states from entering their orders into NCIC 2000. However, state agencies that conduct background checks would generally have access to state or local databases where the restraining order information was originally recorded. In a well-publicized incident in Colorado last year, the FBI approved the transfer of a firearm to an individual who should have been prohibited from purchasing a firearm due to an active restraining order. The information regarding the restraining order was not available to the FBI through NICS, but, according to state officials, it would have been accessible to a Colorado law enforcement agency. The prohibited individual purchased the firearm and used it to kill three children.<sup>6</sup> FBI officials acknowledged that compatibility problems exist in some states and noted that these states are working with NCIC 2000 officials to resolve the problems.

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### States May Be Better Able to Interpret State Laws

State agencies participating in NICS may be better able to interpret their own state's laws to determine a person's eligibility to purchase firearms than the FBI. Many states have enacted their own unique statutes regarding the sale and possession of firearms—including requirements for firearms purchase permits, mandatory waiting periods, and notification to state or local authorities. These state laws can have complex provisions, particularly regarding the restoration of an individual's rights to possess a firearm, once those rights have been revoked (e.g., because of criminal activity). As such, in performing firearms background checks, state agencies may be better able to understand how their own state's laws apply to an individual's eligibility to purchase a firearm in their state.

The FBI agreed that state agencies may be better able than the FBI to interpret their own applicable state laws. Also, this belief is consistent with analysis of appeals decisions regarding firearms-purchase denials made by the FBI under NICS. For example, during the first year of NICS operations:

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<sup>6</sup> Although currently a full-participant state in NICS, at the time of this incident, Colorado had discontinued its state-run instant check program—which had been in operation since 1994—due to financial considerations. Following the publicity surrounding the incident, funding for the program was reinstated by executive order and later permanently reauthorized by the state legislature.

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- About 22 percent (2,710) of the appeals (on which a final decision had been reached as of November 30, 1999) were successful—that is, the denials were reversed.
  - About 42 percent of reversed denials (for which the reason for reversal was available) occurred because FBI examiners had misinterpreted state statutes or records in making the initial denials.

To help improve interpretation of state laws, the FBI contacted the states via mass mailing in June 1999 to request that the states validate their firearms laws. Subsequently, the FBI made state law information widely accessible electronically within the law enforcement community by include such information in the Law Enforcement On-Line Internet site.<sup>7</sup>

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## Barriers to Increased State Participation in NICS

The FBI acknowledges that states may have certain advantages in conducting NICS background checks, including access to additional data in their own state and the ability to better interpret their own criminal history records and firearms laws. Further, according to the FBI, the functioning of NICS would be more effective and efficient if more or all states were full participants (i.e., if each state had a designated agency for conducting background checks). However, at the time of our review, most states were either nonparticipants or partial participants in NICS. Despite the potential advantages of states conducting background checks, any consideration of ways to encourage states to be full participants in NICS would need to recognize the following mitigating factors:

- Fiscal Priorities. States may have competing fiscal priorities that prevent them from initiating or expanding their role in NICS. Because the FBI performs NICS checks without charging a fee, some states may consider performing this effort at the state level to be a waste of state resources. One state—South Carolina—recently dropped out as a full participant in NICS, and FBI officials noted that four other states may be at risk to drop out because they are currently operating under executive order rather than state statute. Federal funding proposals—including a NICS user fee and direct appropriations—have been developed that could increase state participation in NICS; however, these proposals have not been approved by Congress.
- Handguns vs. Long Guns. States that already conduct NICS background checks for handguns—such as Maryland and Washington—may not want to expand their responsibilities to long guns, which may be viewed as less

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<sup>7</sup> Law Enforcement On-Line is a secure law enforcement Internet site managed by the FBI, which provides communication and information services to the federal, state, and local law enforcement community.

of a public safety risk than handguns. And, as noted above, the FBI is already performing long-gun background checks in those states free of charge.

- States' Rights. Some states may be philosophically unwilling to participate in NICS, as demonstrated by the various state legal challenges to the local background check requirements of interim Brady.<sup>8</sup> Because NICS was also established under the Brady Act, some states may consider NICS implementation to be a federal government responsibility.
- Resources/Expertise. States may encounter difficulties in conducting timely or complete background checks for a variety of administrative reasons, including a lack of resources or expertise. During early 1999, for example, the Maryland State Police encountered difficulties in processing NICS background checks in a timely manner, allowing a number of prohibited persons to purchase handguns.

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## Default Proceed Transactions Pose Public Safety and Other Concerns

During the first 10 months of NICS implementation—November 30, 1998, through September 30, 1999—2,519 individuals who were sold guns were later determined by the FBI to be prohibited persons. These were default proceed transactions resulting from NICS background checks were not completed by the FBI within the 3 business days allowed by statute under the Brady Act. After 3 days elapsed, these transactions were considered default proceeds, and the gun dealers were then legally able to transfer the firearm without an affirmative response from the FBI as to the purchaser's eligibility.<sup>9</sup>

According to FBI officials, default proceed transactions occur primarily due to lack of arrest dispositions in automated state criminal history records. A typical example of a delayed NICS transaction involves a record showing a felony-related arrest (not a federal disqualifier) but no information about whether the case was prosecuted and resulted in a conviction (which would be a federal disqualifier). In these instances, additional research is needed before the transaction can be approved or denied. FBI examiners typically must contact a state or local entity that has the needed information—often a local court—to determine the purchasers' eligibility. The ability to obtain the required disposition information in a timely manner depends on several factors, including whether the court is open, the willingness of the court clerk's staff to assist

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<sup>8</sup> In Printz v. U.S. (521 U.S. 898), the Supreme Court ruled that the Brady Act's interim (phase I) provision commanding the CLEO of each local jurisdiction to conduct background checks was unconstitutional in that it compelled state officers to execute federal law.

<sup>9</sup> A small number of these—33—actually occurred within 3 business days. According to FBI officials, for these delayed NICS transactions the gun dealer transferred the firearm to a prohibited person before 3 business days had elapsed, without having received a proceed or deny response from NICS.

the FBI, and the availability and accessibility of the disposition information.

FBI data on the 2,519 default proceeds show that an average of 25 business days elapsed between the initial NICS inquiry and the date that the FBI initiated retrieval of the firearms. In addition:

- 5 percent (118) of the transactions were resolved in 5 business days or less, the amount of time previously allowed under interim Brady to conduct a background check;
- 77 percent (1,937) of the transactions were resolved in 30 business days or less; and
- 91 percent (2,288) of the transactions were resolved in 60 business days or less.

Further, the actual number of default proceed transactions involving prohibited persons might have been higher than the 2,519 already identified by the FBI. During the first year of NICS implementation, the FBI estimates that it was unable to resolve, within 21 days, about 75,000 background checks—roughly 1.7 percent of the 4.4 million checks that the FBI conducted. According to FBI officials, these delayed transactions could not be completed because the FBI was never able to obtain information on arrest dispositions in order to verify the purchaser's eligibility. Because, as reported by the FBI, background checks delayed more than 24 hours are more likely to involve prohibited persons than other NICS checks, some of these 75,000 transactions potentially represent firearms sold to prohibited persons. Given the potential increased risk to public safety, the additional demands on law enforcement resources, and the exposure of law enforcement agents to the risks associated with firearms retrievals, it is therefore important to explore options for reducing the number of these default proceed transactions.

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### Options for Improving NICS by Minimizing Default Proceed Transactions

To minimize the number of default proceeds involving prohibited persons, various options can be considered. One option is to continue providing grant funds to states to improve the quality and completeness of automated criminal history records. Another option is to provide financial incentives in order to increase the number of states that participate in NICS. Finally, another option would be to amend the 3 business-day default proceed requirement of the Brady Act to treat differently those potential purchasers with arrests for disqualifying offenses with no disposition information. These options should be considered complementary, rather than mutually exclusive.

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## Federal Grants to Improve State Criminal History Records

Because, according to the FBI, most default proceeds occur due to a lack of automated or complete state criminal history records, one option for reducing or minimizing these delayed transactions is to help states upgrade the quality and completeness of these records. A relevant federal effort ongoing since 1995 is the National Criminal History Improvement Program (NCHIP), which provides grant funds to states. Administered by the Bureau of Justice Statistics, NCHIP has provided funding to assist states to improve the quality and accessibility of their criminal history records, in order to support the implementation of NICS and enhance the effectiveness of NICS background checks. Federal obligations under NCHIP totaled about \$293 million during fiscal years 1995 through 1999. Additionally, 5 percent of the funds awarded to states each year under the Byrne Formula Grants Program are to be used for improving criminal justice records.<sup>10</sup> Justice officials said that they plan to address NICS implementation issues—such as automation and accessibility of records on arrest dispositions—in future years by seeking increased funding through NCHIP grants.

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## Financial Incentives to Encourage State Participation in NICS

Because states can have advantages over the FBI in conducting NICS background checks—including access to additional data in their own state and the ability to better interpret their own criminal history records and firearms laws—another option for improving NICS' effectiveness and reducing the number of default proceed transactions is to increase state participation in NICS. The following are several approaches that could encourage such participation:

- NICS User Fee. Establishing a NICS user fee could remove a disincentive for states to be NICS participants. Currently, states have little incentive to participate because the federal government performs the NICS check free of charge. The FBI has previously introduced budget proposals to fund NICS operations with a user fee. Congress, however, has acted to prohibit a NICS user fee by including prohibiting language in the Department of Justice's fiscal year 1999 and 2000 appropriations acts.<sup>11</sup>
- Direct Appropriations. Through direct appropriations, states could be funded to establish and/or operate NICS units. The U.S. Senate passed a provision in its 1999 Juvenile Justice bill that would have authorized \$40 million in direct appropriations to states that participate in NICS.<sup>12</sup> The

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<sup>10</sup> Crime Technology: Federal Assistance to State and Local Law Enforcement (GAO/GGD-99-101, June 7, 1999), pp. 29 and 31.

<sup>11</sup> Public Law 105-277 (Oct. 21, 1998) and Public Law 106-113 (Nov. 29, 1999), respectively.

<sup>12</sup> Title VIII, section 861, S. 254, passed by the Senate on May 20, 1999.

House version of the bill differed markedly from the Senate version, so the legislation was sent to conference to resolve the differences. However, the 1999 legislative session ended without any further action being taken.

- Criminal Justice Grants. Although the Supreme Court has ruled that states cannot be required or mandated to conduct Brady background checks, the Court has recognized elsewhere that Congress, in general, may impose reasonable conditions on the receipt of federal funds by states.<sup>13</sup> Incentive grants, perhaps associated with an existing criminal justice grant program, could be offered to states that agree to become NICS participants. One such example of an incentive grant is the Violent Crime Control and Law Enforcement Act of 1994,<sup>14</sup> which authorized federal incentive grants to eligible states for building or expanding correctional facilities for violent offenders, if the states implemented measures ensuring stricter sentences for violent offenders. In addition to incentive grants, the NCHIP grant program already authorizes funding for, among other things, states to establish programs to participate in NICS. However, NCHIP grant requirements currently preclude such funds from being used to cover any ongoing operating costs of conducting the background checks.

### Amend Brady Act to Minimize Default Proceed Transactions

Given the long-term nature of efforts to improve automated criminal history records and the possibility that not all states would agree to become NICS participants, another option involves amending the 3 business-day default proceed requirement of the Brady Act to treat differently those potential purchasers with arrests for disqualifying offenses with no disposition information.

### State Processes that Minimize Default Proceed Transactions

To illustrate the impact that amending the Brady Act could have on the number of these default proceed transactions, we identified three different state background check processes—Washington, Colorado, and Georgia—that tend to minimize such default proceed transactions:

- Washington. In Washington, which is a partial participant in NICS (handguns only), state law allows up to 5 days to perform a background check. However, if available records indicate the prospective purchaser has an arrest for a potentially disqualifying offense, a hold for up to 30 days can be placed on the transaction's approval, pending receipt of disposition information to verify the purchaser's eligibility to possess a firearm. After 30 days, if the disposition of the arrest still cannot be verified, an extension

<sup>13</sup> *New York v. U.S.*, 505 U.S. 144, 165 (1992); *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

<sup>14</sup> Public Law 103-322 (Sept. 13, 1994).

of the hold may be initiated by obtaining a judicial order showing good cause.<sup>15</sup>

- Colorado. Operating as a full-participant state under NICS, Colorado can deny a purchaser with an open disqualifying arrest (such as a felony), even if the disposition cannot be obtained within the 3 days allowed under permanent Brady, thus obviating the need for additional time to further research the transaction.
- Georgia. Also operating as a full-participant state under NICS, Georgia has issued regulations stating that, where a background check identifies the existence of a criminal record that is not immediately available so as to determine the eligibility of the purchaser (e.g., an arrest disposition), the gun dealer may not transfer the firearm until being advised by the state that the purchaser is not prohibited.

#### Potential Impact of Amending the Brady Act

Amending the 3-business-day default proceed requirement of the Brady Act could have a significant impact on reducing the number of default proceeds involving prohibited persons and mitigating public safety concerns. For example, either the Colorado or the Georgia approach would, for all intents and purposes, eliminate default proceed transactions, including those where a prohibited person obtains a firearm. The Colorado approach, however, would result in some purchasers being incorrectly denied based solely on arrest records, with the burden then being placed on the purchasers to appeal the decisions and correct the records. The Georgia approach should not result in incorrect denials; however, it places no limit on the amount of time allowed to research the transaction.

Under the Washington state approach, if a 30 business-day hold had been in effect during the first 10 months of NICS, the number of default proceed transactions would have been reduced by over 75 percent. Also, according to FBI data, such a hold on delayed transactions would have affected only about 88,000 (or 2 percent) of all NICS transactions—those that the FBI has reported to be 20 times more likely to involve a prohibited person than transactions involving the average gun buyer.<sup>16</sup> Therefore, additional time to research such delayed transactions could play a significant role in preventing firearms sales to potentially prohibited persons.

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<sup>15</sup> Washington's 30-day hold rule also applies to firearms transactions where the background check indicates open criminal charges, pending criminal proceedings, pending commitment proceedings, or an outstanding warrant.

<sup>16</sup> FBI, Criminal Justice Information Services Division, National Instant Criminal Background Check System: Operations Report (November 30, 1998 – December 31, 1999). More specifically, FBI data for the first 13 months of NICS implementation show that delayed background checks taking more than 24 hours accounted for about 38 percent of the total number of NICS denials, compared with the overall NICS denial rate of about 2 percent.

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## Matters for Congressional Consideration

In our April 12, 2000, report, we suggested that Congress may wish to consider one or more of the following options for improving NICS by minimizing the number of default proceed transactions involving the transfer of firearms to prohibited persons:

- Recognizing the importance of accurate criminal history records to NICS' effectiveness, continue providing federal grants to states for improving the quality and completeness of automated criminal history records.
- Recognizing that state agencies generally are better positioned than the FBI to conduct NICS background checks, provide financial assistance to states in order to increase the number of states that participate in NICS.
- Recognizing the public safety risks posed by NICS default proceed transactions, amend the 3 business-day default proceed requirement of the Brady Act to treat differently those potential purchasers with arrests for disqualifying offenses where arrest disposition information is not readily available.

The first two options could offer a positive, long-term impact on the overall efficiency and effectiveness of NICS. The third option could immediately reduce the number of prohibited persons receiving firearms under NICS by providing additional time to research incomplete criminal history records.

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Mr. Chairman, this concludes my prepared statement. I would be pleased to answer any questions that you or other Members of the Committee may have.

### **Contacts and Acknowledgment**

For further information regarding this testimony, please contact Laurie E. Ekstrand on (202) 512-8777 or Danny R. Burton on (214) 777-5600. Individuals making key contributions to this testimony included Philip Caramia, Mary Lane Renninger, and Ellen Wolfe.



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